In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-724

PUBLIC INTEREST RESEARCH GROUP, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 522 F.2d 1060. The order of the Federal Communications Commission (Pet. App. 23a-27a) is reported at 48 FCC 2d 614. The order of the Commission denying reconsideration (Pet. App. 28a-29a) is reported at 49 FCC 2d 411. The related *Fairness Report* is reported at 48 FCC 2d 1.

JURISDICTION

The judgment of the court of appeals was entered August 18, 1975. The petition for a writ of certiorari was filed November 17, 1975 (November 16, 1975, was a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission abused its discretion in ruling that television advertisements for snowmobiles are standard product commercials which do not meaningfully discuss controversial issues of public importance under the Commission's recent revision of its Fairness Doctrine.

STATUTES INVOLVED

Section 315(a) of the Communications Act of 1934, 48 Stat. 1088, as amended, 47 U.S.C. 315, and Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, are set forth in the petition at pp. 2-3.

STATEMENT

The fairness doctrine requires broadcast licensees (1) to cover controversial issues of public importance, and (2) to present differing viewpoints on those issues. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 111. The doctrine was developed by the Federal Communications Commission under its authority to regulate broadcasting in the public interest. *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 375-386.

Several television viewers (including the two individual petitioners) complained to the Commission on February 1, 1973, that snowmobile commercials broadcast by station WMTW-TV in Poland Springs, Maine, had discussed one side of a controversial issue of public importance. The viewers asserted that the commercials had presented pro-snowmobile arguments and information at a time when public debate on snowmobiles was widespread. They asked the Commission to require WMTW-TV, pursuant to the fairness doctrine, to present contrasting viewpoints on the issue.

The Commission's Broadcast Bureau, acting under delegated authority,[1] found that the commercials did "nothing more than advance a claim for product efficacy or social utility," and did not deal explicitly with one side of a controversial issue, and it denied the complaint (Pet. App. 20a-21a).

The viewers applied to the Commission for review of the staff action.[2] While the application was pending, the Commission issued its *Fairness Report*. 48 FCC 2d 1, 39 Fed. Reg. 26372 (1974). In that *Report*, the culmination of a three-year study of the fairness doctrine, the Commission revised its policies for applying the doctrine to "paid announcements." The new policy for product commercials, in summary, is as follows (48 FCC 2d at 26, 39 Fed. Reg. 26382 (1974)):[3]

> In the absence of some meaningful or substantive discussion * * *, we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. * * * Accordingly, in the future, we will apply the fairness doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues.

On application for review of the snowmobile ruling, the Commission considered the material[4] submitted by

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[1]47 U.S.C. 155(d); 47 C.F.R. 0.81.

[2]47 U.S.C. 155(d); 47 C.F.R. 1.115.

[3]Adoption of the new policy required abandonment of the Commission's earlier ruling that ordinary cigarette commercials may raise fairness doctrine obligations. *Television Station WCBS-TV*, 8 FCC 2d 381, 9 FCC 2d 921, affirmed *sub nom. Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842.

[4]The material included the texts of the snowmobile commercials (Pet. App. 5a).

the viewers and the station in the light of both precedent and the new policy, and concluded (Pet. App. 26a):

> While hazardous operation, adverse environmental effects and interference with private property rights by snowmobilers may constitute controversial issues of public importance in the complainants' area, it cannot be said that the announcements in question "are devoted in an obvious and meaningful way to the discussion" of those issues.

The Commission found that the staff had correctly denied the complaint, and subsequently denied reconsideration (Pet. App. 28a-29a).

On petition for review, the court of appeals unanimously affirmed the Commission's orders (Pet. App. 1a-15a). The court held that: (1) the decision "conforms faithfully" to the policies established in the *Fairness Report* (Pet. App. 9a); (2) in changing its policy on product commercials, the Commission merely repudiated "its own precedents" and did so "with appropriate notice" and "sufficient clarity of analysis" (Pet. App. 10a); (3) Congress, in amending Section 315 of the Communications Act,[5] had approved the doctrine generally, but had "left questions of application and accommodation to the Commission under the general public interest standard * * *" (Pet. App. 12a)[6]; and (4) the National Environmental Policy Act ("NEPA")[7] does not compel the Commission "to use its licensing

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[5]47 U.S.C. 315. The statute was amended in 1959. 73 Stat. 557.

[6]The court, in rejecting a constitutional argument which petitioners apparently do not raise here, also held that the First Amendment permits the Commission "not only to experiment with full-scale application of the fairness doctrine to advertising but also to retreat from its experiment when it determined from experience that the extension was unworkable" (Pet. App. 14a).

[7]83 Stat. 852, 42 U.S.C. 4321-4347.

power as a lever to impose special standards upon private licensees in the interest of the environment" (Pet. App. 15a).

ARGUMENT

1. Petitioners' suggestion that the decision below is in conflict with decisions of this Court (Pet. 11-15) is insubstantial. As petitioners concede, this Court "has never addressed the matter of the application of the fairness doctrine to product advertising" (Pet. 11).[8]

Similarly incorrect is petitioners' argument that the decision of the court of appeals conflicts with prior decisions of the United States Court of Appeals for the District of Columbia Circuit (Pet. 8-10). The four cases relied on by petitioners, all of which antedate the *Fairness Report*, do not hold that the fairness doctrine must be applied to product commercials.[9] Rather, those decisions reflected

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[8]Petitioners attempt to show an indirect conflict, citing language dealing hypothetically with snowmobiles, from the dissenting opinion in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 317. The Court in that case held that a city transit system's *ban* on political advertisements on car cards did not violate the First Amendment. *A fortiori*, the decision supports the Commission's discretion not to apply the fairness doctrine to commercial product advertising. In *Bigelow* v. *Virginia*, 421 U.S. 809, also cited by petitioners, the Court overturned the criminal conviction of a newspaper editor for publishing an advertisement for an abortion clinic. But the Court in *Bigelow* did not hold that the newspaper could be required to publish either the advertisement itself or anti-abortion views in response to it. Indeed, the First Amendment bars compulsory application of a "fairness doctrine" to newspapers. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241.

[9]In *Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), the court gave "cautious approval" to the cigarette commercial ruling, but did not hold that the Commission was required to apply the fairness doctrine. *Id.* at 1099. In *Friends of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (C.A. D.C.), that court merely required the Commission to follow its cigarette

existing Commission precedent concerning the relation between the fairness doctrine and advertising.[10] As the court below held (Pet. App. 10a), the Commission, in the light of its experience and in the exercise of its primary responsibility for defining the public interest, expressly

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commercial precedent. Noting the Commission's pending fairness study, however, the Court stated:

> *Pending* * * * *a reformulation of its position,* we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

449 F.2d at 1170 (emphasis added).

In *Retail Store Employees Union* v. *Federal Communications Commission,* 436 F.2d 248 (C.A.D.C.), the court remanded for further proceedings a Commission grant of license renewal without hearing, determining, *inter alia,* that in light of *Banzhaf* and of national labor policy, the Commission had not given adequate analysis to fairness doctrine complaints based on department store commercials aired during a strike of store employees. *Id.* at 256-259.

In *Neckritz* v. *Federal Communications Commission,* 502 F.2d 411 (C.A.D.C.), the court affirmed the Commission's refusal to find fairness doctrine obligations arising from gasoline commercials. Chief Judge Bazelon, who wrote the opinions for the court in *Banzhaf* and *Retail Store Employees Union,* issued a separate statement as to why he voted to deny rehearing in *Neckritz.* Referring to the Commission's new *Fairness Report,* Chief Judge Bazelon stated:

> I am convinced that the case does not merit rehearing *en banc* * * *. [S]ince the decision by the panel in this case the FCC has issued a new statement of policy concerning the Fairness Doctrine and advertising, 39 Fed. Reg. 26372 (July 12, 1974), and * * * review of such statement is currently being sought in this Court in No. 74-1700. I believe that review is the proper vehicle to consider in the first instance the serious issues raised [with regard to the applicability of the doctrine to commercials].

502 F.2d at 419.

[10]In fact, in two of those decisions the court of appeals recognized that the Commission had authority to change its policy toward advertisements. See *Friends of the Earth* v. *Federal Communications Commission, supra,* 449 F.2d at 1170; *Neckritz* v. *Federal Communications Commission, supra,* 502 F.2d at 419.

and lawfully revised its policy in the *Fairness Report*. Its decision in this case was based on this change.[11]

2. Petitioners also argue that: (1) the 1959 amendment to Section 315 required the Commission to "continue" applying the fairness doctrine to product commercials (Pet. 15-18); and (2) NEPA requires that the doctrine be "fully extended" to cover advertisements for products which may affect the environment (Pet. 18-19). The court of appeals correctly rejected both of these contentions.

To begin with, Congress in 1959 could not have "ratified" or frozen into existence a Commission policy concerning advertisements because no such policy existed until the cigarette commercial decision in 1967.[12] Furthermore, this Court held in *Red Lion, supra*, that Congress in amending Section 315 had approved the general tenets of the doctrine, but that it had left questions of application and accommodation to the Commission.

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[11]Judicial review of the entire *Fairness Report* has been sought in *National Citizens Committee for Broadcasting* v. *Federal Communications Commission and United States of America*, C.A.D.C., No. 74-1700. However, that case is in abeyance, prior to briefing, pending Commission action on petitions for reconsideration of the *Report*.

[12]Petitioners err in relying on *Sam Morris*, 11 FCC 197 (1946), as the origin of the application of the fairness doctrine to commercials. First, the fairness doctrine itself was not articulated until 1949, three years after the *Sam Morris* decision, although the obligation to cover public issues fairly had always existed under the public interest standard. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). Second, in *Sam Morris* the Commission refused to grant relief on the basis of allegations that the licensee had aired one side of a controversial issue by presenting liquor advertisements. Third, the Commission's dictum that liquor commercials could raise controversial issues was based on the fact that almost half of the nighttime service area of the station was legally "dry." And fourth, the *Sam Morris* dictum was not once followed during the 13 years between its issuance and the 1959 amendments to Section 315.

395 U.S. at 380-386.[13] The court of appeals correctly found that the Commission's discretion in applying the doctrine had not been so narrowly constricted as petitioners urge.

Finally, NEPA does not obligate the Commission to require advocacy of the government's view or any other view on environmental issues.[14] Environmental issues of course may be controversial; traditional application of the doctrine takes that into account. But NEPA has not changed the threshold requirement that triggers the obligation to present contrasting views. Cf. *United States* v. *SCRAP*, 412 U.S. 669, 694-695. The importance of the issue alleged to have been discussed can have no bearing on the entirely different question of whether the issue was discussed. The court of appeals correctly found it reasonable for the Commission to determine that the snowmobile commercials had not meaningfully discussed any controversial issue.

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[13]See also *Columbia Broadcasting System* v. *Democratic National Committee*, *supra*, 412 U.S. at 122, where this Court stated that Congress had given the Commission the flexibility to experiment in the fairness area "with new ideas as changing conditions require."

[14]Established government policies should not be favored by special treatment under the fairness doctrine, whose purpose is to further robust, open debate. See Simmons, *Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective*, 75 Col. L. Rev. 1083, 1099-1100, 1105 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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